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Evidence

Margaret E. Thorp

EVIDENCE

I. REFRESHING MEMORY

In affirming a conviction for receiving stolen goods, the South Carolina Supreme Court in *State v. Broome*,[1] held that it was not error for the solicitor to use his notes of an earlier conversation with a juvenile witness to elicit additional incriminating statements made to the juvenile by defendant. The witness and two other youths had stolen several containers of old coins and later sold them to defendant at a discount. When apprehended by police, the juvenile admitted the theft and divulged defendant's purchase of stolen property. Defendant subsequently was arrested for receiving stolen goods.

At trial the juvenile testified on direct examination that defendant had said, "[D]on't steal from the poor and give to the rich; steal from the rich and give to the poor."[2] In an effort to prompt further incriminating testimony, the solicitor offered the witness a paper on which the solicitor had written certain parts of an earlier discussion between them. He subsequently testified that defendant had also said, "[D]on't tell anybody, you know, that we made this deal tonight," and, "[D]on't tell me any thing, the less I know the less I worry."[3] The jury found defendant guilty of receiving stolen goods.

On appeal, the supreme court affirmed Broome's conviction. Defendant asserted error in the solicitor's use of his notes to refresh the juvenile witness' memory. The court's response reiterated the rule that "because it is the recollection of the witness and not the memorandum that is in evidence, it is not incumbent that the refreshing material be made by the witness himself,"[4] and concluded that "the record amply reflects that the juvenile testified from his memory independently and apart from the source of refreshment."[5]

In line with the majority of jurisdictions, the court clearly distinguished between the two situations often referred to as refreshing recollection.[6] In the first situation, after seeing the memorandum, the witness speaks from his own refreshed memory, and

1. 268 S.C. 99, 232 S.E.2d 324 (1977).
2. *Id.* at 102, 232 S.E.2d at 325.
3. *Id.*
4. *Id.* at 103 n.1, 232 S.E.2d at 325 n.1.
5. *Id.* at 103, 232 S.E.2d at 325.
6. *Id.* C. MCCORMICK, EVIDENCE § 9 (2d ed. 1972) [hereinafter cited as MCCORMICK].

depends upon his present recollection of the facts. Use of the memorandum is permitted, regardless of when and by whom it was made. In the second, the witness cannot remember the facts independently and relies solely upon the paper as an accurate record of a past memory. Use of the memorandum is not permitted in this situation unless the witness himself made the original contemporaneously with the events to which it refers.[7]

In applying these rules the court in *Broome* determined that the record reflected a situation of the first type in which the witness speaks from his own memory. While one may question whether the record truly reflected an independent recollection by the witness, this crucial determination seemed well-founded to the court based on the record presented. Because the juvenile witness' testimony, in the court's view, was independent of the solicitor's notes and was his own recollection of defendant's statements to him, *Broome* is consistent with earlier South Carolina case law on refreshing memory.[8]

Broome serves to illustrate by negative example the necessity for adequate witness preparation before trial. Ideally, counsel refreshes the memory of the witness by reviewing the relevant data prior to the court appearance. If, however, the witness is still unable to recall facts while testifying, counsel may resort to using memoranda to refresh memory on the stand.[9] The practitioner should employ this practice only when compelled by necessity because a jury may lose confidence in a witness' testimony.[10] A jury also may look more favorably upon use of memoranda prepared by the witness rather than notes written by counsel.

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7. In contrast to the rule in South Carolina and the majority of jurisdictions, the minority rule makes no distinction between writings used to refresh present memory and requirements for records of past recollection. In both instances, under the minority rule, use of refreshing memoranda is restricted by requirements of authorship, guaranty of correctness, and time of making. *See* MCCORMICK, *supra* note 6, § 9 at 15.

After examination of the two views on refreshing memory, Wigmore endorsed the majority rule. 3 J. WIGMORE, EVIDENCE §§ 725-65 (Chadbourn rev. 1970) [hereinafter cited as WIGMORE]. Dean McCormick, recognizing the fallibility of memory, believed that when refreshing memory the additional requirements of authorship and timing "have a plausible basis in expediency;" however, he felt that the majority rule can work well in practice because other sufficient safeguards exist to protect against abuse. MCCORMICK, *supra* note 6, § 9, at 16-17.

8. *See, e.g.*, Copeland Co. v. Davis, 125 S.C. 449, 119 S.E. 19 (1923); Gwathmey v. Foor Hotel Co., 121 S.C. 237, 113 S.E. 688 (1922).

9. The South Carolina attorney when practicing in federal courts may use Rule 612 of the Federal Rules of Evidence as a guide to procedures for refreshing memory with a writing. FED. R. EVID. 612. *See also* Advisory Committee's Note to Rule 612.

10. MCCORMICK, *supra* note 6, § 9, at 15.

II. USE OF BLACKBOARDS

An unusual use of a blackboard to list claims prompted the South Carolina Supreme Court to reverse and remand the lower court's decision in *Ballard v. Rowe*,[11] holding that submission of the blackboard exhibit to the jury was so prejudicial that a new trial was required. The controversy centered around two contracts for construction of a shrimp boat. Defendants-appellants William D. and Robert I. Player, the boat owners, had employed defendant-respondent W. E. Rowe, the general contractor, to build a boat. In turn, Rowe subcontracted virtually the entire job of building the shrimp boat to plaintiff Lee C. Ballard, III. Ballard subsequently brought suit against the Players and Rowe for amounts due under the subcontract and for incidental and extra expenses for additions and changes beyond the subcontract specifications. The Players and Rowe cross-claimed against each other. Rowe contended that $25,839.46 was still owed under the general contract. The Players, however, asserted that they owed nothing because Rowe had failed to carry out the contract.

At trial, after the judge had concluded jury instructions and had sent the jury to deliberate, the jurors returned to the courtroom to ask for an itemized list of extra work and materials that plaintiff claimed against defendant Rowe. When counsel for both plaintiff and Rowe agreed and counsel for the Players did not object, the requested items were written on a blackboard out of the jury's presence.

The actions that followed provided the basis of the successful appeal to the supreme court. Over Players' objection, defendant Rowe's counsel added a column to the blackboard listing representing Rowe's cross-claims against the Players for extra labor and materials beyond the general contract requirements. Before revealing any lists to the jurors, the judge asked whether they also wanted an itemization of the extra labor and materials claimed by Rowe against the Players. The foreman answered yes and the trial judge, again over objection from Players' counsel, permitted jurors to see both blackboard listings and to take the blackboard into the jury room. The jury returned verdicts of $12,596.89 in favor of Ballard against Rowe and $19,914.35 on the cross-claim in favor of Rowe against the Players.

On appeal, counsel for the Players renewed objections made at trial asserting that the trial judge erred in allowing submission

11. 268 S.C. 517, 234 S.E.2d 890 (1977).

of the blackboard itemizations to the jurors after all evidence was before the court. They contended that certain blackboard figures were not supported by the evidence and that allowing jurors to take the blackboard into the jury room "was tantamount to introducing evidence after the case was closed and unduly emphasized the claims and contentions of [Rowe]."[12]

Rowe, however, argued that evidence in the record supported the blackboard figures, that permitting use of the blackboard lists was properly within the trial judge's discretion, and that even if error was present, it was harmless error because exactly the same figures were listed for the claims between Ballard and Rowe without objection from the Players.[13] Citing *Johnson v. Charleston and Western Carolina Railway,*[14] *Indemnity Insurance Co. of North America v. Odom,*[15] and *Edwards v. Lawton,*[16] Rowe established the propriety of counsel's use of a blackboard during the jury argument to illustrate points, to calculate damages, or to clarify other facts or figures properly arguable.[17] Rowe's counsel conceded that *Ballard* could be distinguished from these cases because the blackboard was present in the jury room during deliberations in the *Ballard* trial, but argued that during deliberations jurors at times are allowed to use notes or papers not introduced into evidence.[18] Counsel failed, however, to cite any authority for the propriety of utilizing blackboard lists compiled *after* the close of the case. A valid distinction should be drawn between the use of blackboards as an aid during jury arguments and the unorthodox use of blackboards in *Ballard* because, as stated in appellant's brief, "this lately conceived exhibit" submitted to jurors after the case was closed "precluded the Appellant's attorney from examining witnesses relative to the exhibit and precluded him from discussing the exhibit in his argument to the jury and was therefore prejudicial to the Appellant's case."[19]

Noting that "the presiding judge has great influence upon the minds of the jurors, who are quick to seize upon any intimation by work [*sic*] or gesture from him,"[20] the court agreed with

12. *Id.* at 520-21, 234 S.E.2d at 892.
13. Brief for Respondent at 1.
14. 234 S.C. 448, 108 S.E.2d 777 (1959).
15. 237 S.C. 167, 116 S.E.2d 22 (1960).
16. 244 S.C. 276, 136 S.E.2d 708 (1964).
17. Brief for Respondent at 3.
18. *Id.* at 4-8.
19. Brief for Appellants at 6.
20. 268 S.C. at 521, 234 S.E.2d at 892.

the contentions set forth by the Players. Although no authority was cited for its holding, the court stated that the likelihood of prejudice from "the submission of the equivalent of an exhibit to the jury, without the request of the jury and over the objection of counsel for the boat owners, is sufficiently strong that a new trial should be held."[21]

Muted criticism in *Ballard* may obscure the actual error perceived by the supreme court. Although not mentioned in the opinion, the constitutional provision that grants to trial judges the authority to declare the law also states that a charge to a jury is not to be on the facts.[22] To a layman the trial judge's volunteering of a written summary of figures might appear to be a tacit approval of the claims. The prejudicial fault in *Ballard,* then, may lie not in the practice of using a blackboard to summarize, but in the trial judge's actions that so powerfully influence jurors.

Ballard v. Rowe does not signal a retreat from supreme court approval of blackboard use during trials. The opinion does not criticize the practice of using blackboards to illustrate counsel's argument or to clarify a witness' testimony. Instead, the court's objection appears to be limited to the unorthodox use of a blackboard in the lower court. At trial, counsel could have requested that the trial court exercise his discretion to re-open the case to admit further evidence.[23] Had counsel made this request, the propriety of the blackboard exhibit, whether figures listed were supported by sufficient evidence or not, could have been resolved without the necessity of an appeal.

III. BUSINESS RECORDS: BEST EVIDENCE RULE AND HEARSAY

In the past a South Carolina practitioner could not rely on uniformity in treatment of business records as evidence. Although some lower courts and some supreme court decisions sanctioned the admission of various business records, other cases made admissibility uncertain.[24] Recognizing this problem, Professor Dreher in 1967 called for the enactment of a uniform business

21. *Id.*

22. S.C. CONST. art. V, § 17.

23. As a matter of general law, a trial judge has discretion to re-open a case even after the jury has begun deliberations. WIGMORE, *supra* note 7, at § 1880. *See* State v. Harrison, 236 S.C. 246, 113 S.E.2d 783 (1960) (case re-opened after close of testimony). *See also* People v. Frohner, 65 Cal. App. 3d 94, 135 Cal. Rptr. 153 (1976) (holding that it was error for the trial judge *not* to re-open the case after jurors had begun deliberations).

24. *See, e.g.,* W.T. Rawleigh Co. v. Thompson, 122 S.C. 43, 114 S.E. 702 (1922).

records act.[25] In 1977 the supreme court in *Grand Strand Construction Co. v. Graves*[26] clarified the status of the business records rule in South Carolina. One year later, the South Carolina General Assembly provided specificity by enacting the Uniform Business Records as Evidence Act.[27]

In *Grand Strand* the supreme court held that business records were admissible as evidence even though the permanent ledger in question was not the original record of man hours spent on the project and the record was hearsay. Appellant Grand Strand Construction Company had contracted with respondents to build a house with labor at a cost of six dollars per man hour. Because respondents paid only $4500 for materials and labor, the company sought to foreclose a mechanic's lien to recover an additional $6229.61 for labor.

At trial, in an attempt to prove the number of man hours chargeable to respondents' account, the company introduced testimony tracing the procedures used for recording man hours worked on the job site and paying employees for their time worked. The job foreman or a sub-foreman tabulated hours on scraps of paper and gave the results to Grand Strand's secretary. Normally a foreman handed these tabulations to the secretary or slipped them under her office door, although he might at times relay the totals by telephone. After entering the total hours into a permanent ledger, the secretary discarded the scraps of paper. She then disbursed to company employees payroll checks based on the number of hours recorded in the ledger. Respondents objected when the ledger identified by Grand Strand's secretary was offered into evidence. The lower court, finding that the ledger was not a book of original entry, refused to admit it because of the best evidence rule. Because Grand Strand was incapable of proving respondents' indebtedness, an involuntary nonsuit was granted.

On appeal the South Carolina Supreme Court reversed and remanded, finding that the trial court's refusal to admit Grand Strand's ledger was "a manifest error of law and . . . an abuse of discretion."[28] The court held that the ledger was a book of original entry constituting the best evidence of man hours chargeable to respondents' account and noted that it would be a practi-

25. J. DREHER, A GUIDE TO EVIDENCE LAW IN SOUTH CAROLINA 81 (1967).
26. 269 S.C. 594, 239 S.E.2d 81 (1977).
27. 1978 S.C. Acts 552. The text of the new act appears at note 34, *infra*.
28. 269 S.C. at 597, 239 S.E.2d at 82.

cal denial of justice to make Grand Strand produce all scraps of paper used to tabulate man hours.

The *Grand Strand* decision made South Carolina law on business records and the best evidence rule consistent with generally accepted views of recognized authorities.[29] The best evidence rule requires production of the original writing, but allows excuses for non-production that typically are based on loss or destruction of the original, its possession by a party beyond the jurisdiction of the court, failure of an adversary having possession to produce the original after notice, and statutory exceptions that allow certified copies of public records in lieu of the original.[30] As McCormick noted, "[t]he production-of-documents rule is principally aimed, not at securing a writing at all hazards and in every instance, but at securing the best *obtainable* evidence of its contents."[31] That was precisely the problem faced by Grand Strand; if not permitted to use the ledger as the best obtainable evidence of the number of man hours, the company faced the very real hazard of being unable to collect money due for labor provided to the respondents.

In addition to the best evidence rule issue, the introduction of business records also involves a hearsay problem. To deal with the hearsay objection, the supreme court quoted from *J.L. Mott Iron Works v. Kaiser Co.*[32] and stated that although a business record admittedly is hearsay, it should be acceptable as a proper exception to that rule. The common law generally has recognized the business records exception because of the usual reliability and accuracy of regularly kept books and records.

Grand Strand effectively eliminated any lingering doubts about the existence of a business records rule in South Carolina and provided a valuable precedent for admitting into evidence regularly kept books of account. In most jurisdictions today admissibility of regularly kept records is a matter of statutory law.[33] In South Carolina, however, until the 1978 enactment of the Uniform Business Records as Evidence Act,[34] the practitioner was

29. *E.g.*, MCCORMICK, *supra* note 6, at §§ 229-30. *Accord*, 5 WIGMORE, *supra* note 7, at §§ 1517-61.

30. MCCORMICK, *supra* note 6, §§ 237-40, at 570-75.

31. *Id.* § 237, at 570 (emphasis in original).

32. 131 S.C. 394, 103 S.E. 783 (1920), *aff'd.*, 257 U.S. 240 (1920).

33. MCCORMICK, *supra* note 6, § 306, at 719-20.

34. In 1977 adoption of the Uniform Business Records as Evidence Act and Uniform Photographic Copies of Business and Public Records as Evidence Act was proposed to the South Carolina General Assembly. The Uniform Acts were incorporated into one bill, H.

forced to rely on precedents allowing the admission of business records despite the hearsay and best evidence rules. Since June 30, 1978, the effective date of the new Uniform Business Records as Evidence Act, the practitioner in South Carolina courts can use the statute to admit a broader range of business records.

A brief comparison of a few major differences between the new act and the federal rules of evidence may be useful. The federal rules broaden the traditional definition of an "original" and provide for admissibility of duplicates.[35] The second section of the new South Carolina act allows the admission of photographic copies of business and public records but does not provide for data compilations, such as computer print-outs. More closely related to *Grand Strand,* the hearsay exception for regularly kept

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2819, 102nd Gen. Ass. 1st Sess. (1977). This bill was enacted on June 30, 1978, 1978 S.C. Acts 552, and reads as follows:

> Be it enacted by the General Assembly of the State of South Carolina:
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> SECTION 1. The term "business" shall include every kind of business, profession, occupation, calling or operation of institutions, whether carried on for profit or not.
>
> A record of an act, condition or event shall, insofar as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition or event and if, in the opinion of the court, the sources of information, method and time of preparation were such as to justify its admission.
>
> This section may be cited as the Uniform Business Records as Evidence Act.
>
> SECTION 2. If any business, institution, member of a profession or calling, or any department or agency of government, in the regular course of business or activity has kept or recorded any memorandum, writing, entry, print, representation or combination thereof, of any act, transaction, occurrence or event, and in the regular course of business has caused any or all of the same to be recorded, copied or reproduced by any photographic, photostatic, microfilm, microcard, miniature photographic or other process which accurately reproduces or forms a durable medium for so reproducing the original, the original may be destroyed in the regular course of business unless held in a custodial or fiduciary capacity or unless its preservation is required by law. Such reproduction, when satisfactorily identified is as admissible in evidence as the original itself in any judicial or administrative proceeding whether the original is in existence or not and an enlargement or facsimile of such reproduction is likewise admissible in evidence if the original reproduction is in existence and available for inspection under direction of court. The introduction of a reproduced record, enlargement or facsimile does not preclude admission of the original.
>
> This section shall be so interpreted and construed as to effectuate its general purpose of making uniform the law of those states which enact or adopt it.
>
> This section may be cited as the Uniform Photographic Copies of Business and Public Records as Evidence Act.
>
> SECTION 3. This act shall take effect upon approval by the Governor.

35. FED. R. EVID. 1001-05.

records is broadened by both the federal rules and the Uniform Business Records as Evidence Act through an extension of the traditional definition of business. The federal rule specifically provides that opinions and diagnoses may be the subject of the record, but the South Carolina statute includes only records of acts, events, or conditions. An admissible record in the federal courts must be linked to a person with knowledge, but the South Carolina statute requires only that a custodian or other qualified witness testify to the identity of the record and the manner of its preparation. Both rules have clauses to allow for necessary exceptions. All described records are admissible, according to the federal rule, unless circumstances indicate a lack of trustworthiness.[36] Records under the new South Carolina statute are competent evidence if, in the court's opinion, the circumstances of preparation justify admission of the record.[37] The South Carolina Uniform Business Records as Evidence Act should greatly facilitate the admission of most business records into evidence at trial.

IV. EVIDENCE OF PRIOR CRIMES

Several cases were decided by the South Carolina Supreme Court in 1977 concerning the admissibility of evidence of prior crimes. The issue is especially problematic when a witness is the defendant in a criminal trial because of the likely prejudicial effect on the jury hearing evidence of prior crimes. Although evidence of prior crimes is admissible merely on the issue of the accused's credibility and a limited number of other issues,[38] jurors might infer that the accused has bad character disposing him toward commission of the crime charged.

In *State v. Conyers*[39] appellant was convicted of murder in the arsenic poisoning of her second husband. The supreme court held that it was clearly prejudicial error to admit testimony to show that appellant had also poisoned her first husband when evidence of the earlier crime was not clear and convincing. At trial the state introduced evidence of the poisoning of appellant's son-in-law, mother-in-law, first husband, and a potential business partner. The state then offered evidence that appellant had administered arsenic to each victim in an attempt to show appel-

36. *Id.* 803(6).

37. Uniform Business Records as Evidence Act, § 1, 1978 S.C. Acts 552.

38. For general background in the area of admissibility of prior crimes, *see* 3A WIGMORE, *supra* n.7, at §§ 926, 980; MCCORMICK, *supra* n.6, at §§ 43, 190.

39. 268 S.C. 276, 233 S.E.2d 95 (1977).

lant's motive, knowledge, intent, plan or scheme.

On appeal, appellant argued that the evidence was inadmissible because it related to crimes other than the one for which she was on trial and that even if otherwise admissible, the other crimes were not established by the necessary degree of proof. The court stated the general rule that evidence of prior crimes independent of and unconnected with the one for which the accused is on trial is inadmissible. Citing *State v. Thompson,*[40] *State v. Gregory,*[41] and *State v. Lyle,*[42] the court noted recognized exceptions allowing testimony of prior crimes if it directly supports a "substantial element of the State's case, as where the purpose is to prove motive, intent, absence of mistake or accident, a common scheme or plan embracing several crimes so related to each other that proof of one tends to establish the other, and the identity of the wrongdoer."[43]

The most significant requirement espoused in *Conyers* was that, because of potential prejudice from testimony of prior crimes, proof of the other crime under one of the exceptions must be clear and convincing.[44] The court failed to find clear and convincing proof that appellant poisoned her first husband because, although his body did contain high levels of arsenic, the evidence was insufficient to prove that appellant was the one responsible. Because admission of testimony concerning her first husband's poisoning was clearly prejudicial, the court reversed the conviction and ordered a new trial.

Although the court in *Conyers* mentioned *State v. Lyle* in determining that the proper standard for proof of the prior crime was clear and convincing evidence, the *Lyle* court actually had stated that the court must clearly perceive a connection between the extraneous criminal transaction and the crime charged. These two related standards must both be met before evidence of prior crimes is admissable. The South Carolina practitioner should note these requirements, particularly because the court has al-

40. 230 S.C. 473, 96 S.E.2d 471 (1957).

41. 191 S.C. 212, 4 S.E.2d 1 (1939).

42. 125 S.C. 406, 118 S.E. 803 (1923). For an interesting discussion of *Thompson, Gregory, Lyle,* and other cases in this area, see Reiser, *Evidence of Other Criminal Acts in South Carolina* 28 S.C.L. REV. 125 (1976).

43. 268 S.C. at 280, 233 S.E.2d at 96.

44. *Id.* Compare with this requirement, the Fourth Circuit Court of Appeals' decision in Watkins v. Foster, No. 77-1014 (4th Cir. Jan. 26, 1978), which arose out of a crime occurring in North Carolina. The court required that questioning the accused about other alleged crimes must be in good faith.

ready applied the *Conyers* clear and convincing standard in a recent case.[45]

In *State v. Lee*[46] the appellant questioned whether the solicitor's dwelling on the phrase "crime of moral turpitude" exceeded a permissible attack on the witness' credibility and became an impermissible attack on his character. The appellant had been convicted of rape in 1962 and had been paroled just prior to the time of the rape for which he was on trial. Before the case was tried, the trial judge ruled that the solicitor could attempt to impeach the appellant by asking only whether he had ever been convicted of a crime of moral turpitude. During the trial, although his conviction and parole were discussed on direct and cross-examination of the accused, it was never specified that the crime of moral turpitude was rape.

On appeal the appellant asserted that some of the solicitor's references to the prior conviction during closing arguments amounted to an attack on his character and that the jurors may have considered the prior conviction as substantive evidence of the rape for which he was on trial. One part of the argument that appellant believed to be objectionable was the solicitor's statement that the accused was a menace to society, stressing his conviction of a crime of moral turpitude.

The court restated the rule that a prior conviction of a crime involving moral turpitude may be used to impeach a defendant-witness' credibility, provided the conviction is not too remote in time.[47] After reviewing sections of the solicitor's argument to the jury, the justices held that the solicitor did not exceed the proper scope of inquiry and argument concerning appellant's credibility. Specifically answering one point of appellant's argument, the court stated "that appellant was a 'menace to society' was implicit in the fact of his prior conviction for a crime of moral turpitude and he sustained no prejudice by the solicitor's use of that phrase."[48] Finding remaining exceptions without merit as well, the court affirmed the conviction.

In addition to the proper scope of the argument with crimes of moral turpitude the South Carolina Supreme Court also considered the types of crimes that reflect moral turpitude. *State v.*

45. State v. Hammond, ___ S.C. ___, 242 S.E.2d 411 (1978).
46. 269 S.C. 421, 237 S.E.2d 768 (1977).
47. *See* State v. Vaughn, 268 S.C. 119, 232 S.E.2d 328 (1977).
48. 269 S.C. at 427, 237 S.E.2d at 771.

Carriker[49] differed from those cases already considered because the witness in *Carriker* was not the accused. In appellant's trial for armed robbery, a key state's witness had a previous conviction of possession of drugs without a prescription. The trial judge, however, refused to allow cross-examination of the witness about the offense, and on appeal appellant asserted that the refusal was error.

The brief appellate decision stated that the question is limited to whether mere possession of stimulant drugs without a prescription is a crime of moral turpitude, which is the only crime that is admissible for impeachment. The court held it was not a crime of moral turpitude, but specifically limited the holding to the illegal possession of drugs that may be obtained legally with a valid prescription. The court held that the trial judge did not err in refusing to allow cross-examination of the witness on this prior offense and the conviction was affirmed.

Certain differences should be noted between practice in federal courts and South Carolina courts in this area.[50] In comparison to state court practices, the federal rules contain more safeguards to shield defendants with prior convictions. Whereas South Carolina courts permit evidence of all crimes of moral turpitude, the federal system limits the use to (1) crimes punishable by death or imprisonment longer than one year if the court believes its probative value outweighs its prejudicial effect, or (2) crimes involving dishonesty or false statement, regardless of penalties. South Carolina case law requires only that a conviction used to impeach not be too remote in time. Specific requirements, basically excluding crimes if more than ten years have passed since the prior conviction or imprisonment, are found in the federal rule.[51] The practitioner will note that South Carolina practice generally permits more extensive use of evidence of prior crimes than the Federal Rules.

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49. 269 S.C. 553, 238 S.E.2d 678 (1977).

50. In general, South Carolina case law recognizes that evidence of prior crimes may be admitted to prove motive, intent, absence of mistake or accident, a common scheme or plan, and the identity of the offender. The Federal Rules provide an open-ended list that includes proof of motive, opportunity, intent, preparation, plan, knowledge, identity, and absence of mistake or accident. FED. R. EVID. 404(b).

51. *Id.* 609.